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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 208

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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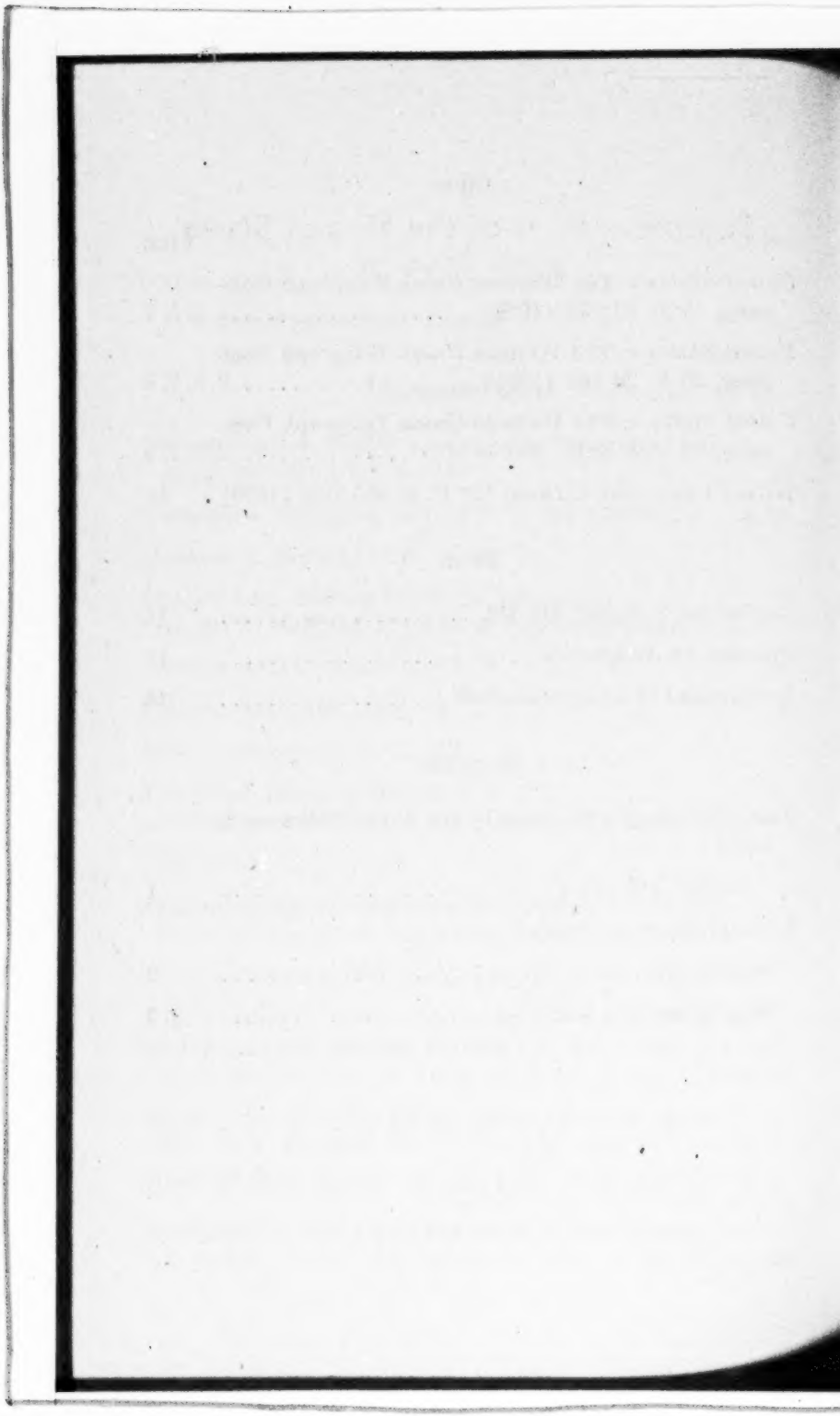

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit handed down on April 15, 1947, in the case entitled *The Travelers Insurance Company against Commissioner of Internal Revenue,* No. 146 October term, 1946, in so far as it affirms the decision of the tax court.

Jurisdiction

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Opinions Below

The opinion of the Tax Court of the United States is reported in 6 T. C. 753. (R 16)

The opinion of the circuit court of appeals for the second circuit, affirming the decision of The Tax Court of the United

States, was handed down April 15, 1947 and is reported in 161 F. 2d 93. (R 34)

Statute Involved

The statute involved is the Internal Revenue Code Section 311 and provides as far as material herein:

> "(a) *Method of Collection.* The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):
>
> "(1) *Transferees.* The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.
>
> "(f) *Definition of "Transferee".* As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee." (26 U. S. C. 1940 ed., Sec. 311.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> "Sec. 29.311-1. *Claims in cases of transferred assets.* The amount for which a transferee of the property of a taxpayer is liable, at law or in equity, and the amount of the personal liability of a fiduciary under section 3467 of the Revised Statutes, as amended (paragraph 81 of the Appendix to these regulations), in respect of any income tax imposed by chapter 1, whether shown on the return of the taxpayer or determined as a deficiency in the tax, shall be assessed against such transferee or such fiduciary, as the case may be, and collected and paid

in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by chapter 1, except as hereinafter provided. The provisions relating to delinquency in payment after notice and demand and the amount of interest attaching because of such delinquency, the authorization of distraint and proceedings in court for collection, the prohibition of claims for abatement and claims and suits for refund, the filing of a petition with The Tax Court of the United States, and the filing of a petition for review of The Tax Court's decision, are included in the sections of the Internal Revenue Code (and regulations pertaining thereto) relating to deficiencies in tax imposed by chapter 1.

"The term 'transferee' as used in this section includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 112, and all other classes of distributees."

Question Presented

Whether the issue of the liability of the petitioner as a transferee for federal income taxes of Northwestern Telegraph Company as presented in this case in the tax court was res judicata by reason of the decision of the District Court for the Southern District of New York in *United States* v. *The Western Union Telegraph Company, et al,* 19 F. 2d 157 (1926), affirmed by the Circuit Court of Appeals for the Second Circuit in 50 F. 2d 102 (1931), and the decision of the District Court for the Southern District of New York in the case entitled *United States* v. *The Western Union Telegraph Company, et al,* 52 Fed. Supp. 553 (1943).

Statement of the Case

The Northwestern Telegraph Company, a corporation organized under the laws of the State of Wisconsin and

operating a telegraph business on July 1, 1881 leased to the Western Union Telegraph Company for a term of 99 years all of its assets and property. Pursuant to the terms of said lease, Western Union agreed to pay directly to the known stockholders $150,000, said sum being 6% upon the par value of the capital stock of $2,500,000 of said Northwestern Telegraph Company (R 28)

After taking possession, Western Union Telegraph Company on or shortly after July 1, 1881, caused to be placed on each certificate of capital stock of Northwestern Telegraph Company the following words:

> "In accordance with the provisions of the contract within named, the Western Union Telegraph Company will pay to the owner and holder of the within certificate, the several dividends therein described, at the time and place therein stated, during the period that said contract shall continue in force." (R 27)

Between 1892 and 1896 the petitioner, The Travelers Insurance Company, acquired lots of the capital stock of Northwestern aggregating 2,000 shares of the par value of Fifty (50) Dollars each. The endorsement hereinbefore mentioned was placed upon the certificates of stock owned by The Travelers Insurance Company. (R 27)

During the taxable years 1940 and 1941, the dividends mentioned in said endorsement were paid directly by Western Union to the stockholders of Northwestern in proportion to their stock holdings. The Travelers Insurance Company in each of said years received from Western Union the sum of $6,000 as holder of 2,000 shares of the stock of Northwestern. (R 28)

Northwestern filed corporation income tax returns for the taxable years 1940 and 1941 in the Office of the Collector of Internal Revenue for the District of Connecticut, reporting an income tax amounting to $36,012.24 for the taxable year 1940 and $46,265.81 for the taxable year 1941. The

taxes shown due on said returns were principally the result of including the amounts agreed to be paid by Western Union during said years to stockholders of Northwestern. No tax was paid under these returns by Northwestern. (R 28, 29)

On or about February 16, 1944 a judgment for delinquent federal income taxes and interest due from Northwestern for the years 1934-1941 inclusive was entered against Northwestern in favor of the United States in the District Court, Civil No. 1028, in the total of $286,445.49 plus $22.20 costs, which judgment included the sum of $36,012.24 and $46,-265.81 owing for the taxable years 1940-1941. Said judgment was not appealed and became final. Execution thereon was duly issued on January 24, 1945 and returned unsatisfied February 1, 1945. No part of said judgment has been paid by Northwestern. (R 29) On March 13, 1945 the Commissioner of Internal Revenue transmitted by registered mail to the petitioner a notice of deficiency proposed to be assessed against it as transferee of the assets of Northwestern with reference to the tax liabilities of said Northwestern for the years 1940-1941. (R7, 29)

The petitioner appealed from the Commissioner's determination on May 16, 1945 to The Tax Court of the United States and assigned as error his failure to acknowledge the scope and effect of the decision in the case entitled *United States* v. *The Western Union Telegraph Company, et al,* 19 F. 2d 157 (1926) in which all the stockholders of Northwestern were made parties defendant and the decision of the United States Circuit Court of Appeals for the Second Circuit unanimously affirming the above cited case 50 F. 2d 102 (1931) and the decision of the District Court for the Southern District of New York in the case entitled, *United States* v. *The Western Union Telegraph Company, et al,* 52 Fed. Supp. 553 (1943) as binding adjudications between the parties and res judicata as to the questions and rights therein involved. (R 3)

The tax court sustained the Commissioner (R 21) and upon appeal to the United States Circuit Court of Appeals, Second Circuit, the decision of the tax court was affirmed. (R 41) The opinion in the circuit court that the Commissioner was not estopped from asserting the petitioner's liability by the prior decisions was based on two grounds: (1) That the issue of transferee liability was not involved in the prior actions (R 38) and (2) that the holding therein that Northwestern had no beneficial interest in the rent paid to its stockholders by Western Union was a mediate step in the court's reasoning which was unnecessary to support the decision. (R 39)

Reasons for Granting a Writ

The lower court has misconstrued the decisions of this court in *Cromwell* v. *County of Sac,* 94 U. S. 351 (1876) and *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620 (1932) and has misapplied said decisions to the facts in this case; and in so doing has decided the same in conflict therewith and in conflict with other applicable decisions of this court.

Wherefore, the petitioner prays that a writ of certiorari may be issued by this court.

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Brief and Argument

1. **The ownership of the right to the rents under the lease between Northwestern Telegraph Company and Western Union Telegraph Company was an ultimate fact in issue in the prior cases and essential to the decisions therein.**

In the former actions, *United States* v. *The Western Union Telegraph Company, et al,* 19 F. 2d 157 (1926), unanimously affirmed (CCA 2 1931) 50 F. 2d 102, and *United States* v. *The Western Union Telegraph Company, et al,* 52 Fed. Supp. 553 (1943), the Government sought the aid of a court of equity to apply the rents due and to become due under the lease agreement of May 7, 1881 to income tax indebtedness of Northwestern Telegraph Company to the Government. In comparing the prayers for relief in the complaints in the two actions, it appears that in each action the Government sought: (1) To restrain the defendant, The Western Union Telegraph Company, from making payments under the lease agreement of May 7, 1881 to the stockholders of the defendant, Northwestern Telegraph Company; (2) To require the defendant, The Western Union Telegraph Company to make payments to the Government of sums becoming due under the lease agreement; (3) A decree that the Government had a lien on the payments to become due under the lease agreement; and (4) For any equitable relief to which the plaintiff under the facts might be entitled.

In the earlier action the ultimate issues were: (1) Whether the rentals arising under the lease agreement of May 7, 1881 were taxable to the defendant, Northwestern Telegraph Company; and (2) Whether, if so, the rentals were the property of Northwestern Telegraph Company, and, as such, could be subjected to the payment of income taxes of Northwestern Telegraph Company at the expense of its stockholders. Judge Bondy held: (1) That the rentals were taxable income of Northwestern Telegraph Company; (2) That Northwestern Telegraph Company could not prevent the defendant The Western Union Telegraph Company from

making its payments under the lease agreement directly to the stockholders of the former; (3) That the right to payments under the lease agreement was not the property of and did not belong to Northwestern Telegraph Company; (4) That the Government did not have a lien thereon under Revised Statutes Section 3146 because Northwestern Telegraph Company had no right or interest therein; and (5) That the Government was not entitled to any equitable relief under the general powers of the court. Upon the appeal the court dealt with the case as: (1) A claim for a lien under Section 3186; and (2) A creditor's bill to reach and apply property of the debtor to its debt. The fact that the court held that the statutory lien could apply only to tangible property does not make the question of the title to the right to the rents any less an essential fact to the determination of the case. Had the court found that Northwestern Telegraph Company owned the right to these rents, it could and would have ordered them paid to the collector and applied to Northwestern's debt under the general equity powers of the court. Judge Bondy said in the District Court: "It therefore does not appear how the rights of the stockholders of the Northwestern Telegraph Company to the payments under the agreements can be held to constitute property belonging to the Northwestern Telegraph Company * * * ." (Page 158); and again (Page 159) "There, therefore, were no rights belonging to Northwestern Telegraph Company on which a lien for a claim against Northwestern Telegraph Company has been or can be imposed." The circuit court held that Northwestern could not prevent Western Union Telegraph Company from paying the stockholders after this agreement and that the shareholders are entitled to their share of the rent as provided in the stock certificate, and can maintain an action for its payment without joining Northwestern Telegraph Company. 50 F. 2d 102, 103 The essential finding in both courts was that Northwestern Telegraph Company had parted with all its right, title and interest to these payments

in 1881 and that at the time the case was tried Norhwestern had no right thereto.

The case of *United States* v. *The Western Union Telegraph Company, et al,* 52 Fed. Supp. 553 (1943) did not, as the lower court has stated (R 39), hold that the rentals were not the property of Northwestern Telegraph Company. What it actually did hold was that the prior action was determinative of the issues presented in the later action, and that the Government was estopped by the judgment in the prior action to make the claim that Northwestern Telegraph Company owned the rights to the rents under the lease.

The turning point in each of these cases was the ownership of the right to these rents. If it had been determined that Northwestern owned the right to these rents or had any beneficial interest therein, then, perforce, the judgment must have been for the Government; but it was not so determined in the earlier case, and in the later case it was held that the decision in the earlier case was determinative of that issue, and therefore judgment was rendered for the defendant. It is submitted that the decision as to the ownership of the rights to these rentals was "necessary to the result in the first suit", in the language of *Evergreens* v. *Nunan,* 141 F. 2d 927 (1944), and not a "mediate fact" within the meaning of that case, as the lower court in this case found. (R 39) Cf. *Last Chance Mining Co.* v. *Tyler Mining Co.,* 157 U. S. 683 (1894).

2. **The ownership of the right to the rents under the lease between Northwestern and The Western Union Telegraph Company is an ultimate fact in issue in this case and essential to the determination thereof.**

The proposed assessment from which this appeal has been taken is a proceeding under Section 311 of the Internal Revenue Code to collect from a transferee of a taxpayer the amount of the taxpayer's debt. The Act defines a transferee as including an heir, legatee, devisee, and distributee and the regulation (regulation 111, section 29.311-1) extends the definition to shareholders of a dissolved corporation, the assignee

or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 112, and all other classes of distributees. The circumstances require, and the burden is upon the government to prove, that there has been a transfer from the taxpayer to the claimed transferee and the liability of the transferee is limited to the amount so transferred. The lower court has held that Northwestern Telegraph "constructively received" the rentals from Western Union so as to render the stockholders liable as transferees for income taxes of Northwestern upon such rentals. (R 39)

Patently, the ownership of the right to these rentals is an essential factor in this case. If Northwestern has no such ownership "constructive" or otherwise, then there could have been no transfer to the petitioner, in this case, from Northwestern and no liability of this petitioner in this case for Northwestern's taxes.

3. The lower court has misconstrued the decisions of this Court in *Cromwell* v. *County of Sac,* 94 U. S. 351 (1876) and *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620 (1932) and has misapplied said decisions to the facts in this case; and in so doing has decided the same in conflict therewith and in conflict with other applicable decisions of this Court.

Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action will operate as an estoppel as to those matters in issue or points controverted, upon the determination of which the finding or verdict in the first action was rendered. *Cromwell* v. *County of Sac,* 94 U. S. 351, 353 (1876); *Southern Pacific Railway* v. *United States,* 168 U. S. 1, 48 (1897); *National Circle of Daughters of Isabella* v. *National Order of Daughters of Isabella,* 270 F. 723, 728 (1920) (certiorari denied 255 U. S. 571); *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620, 623 (1932); *Fishgold* v. *Sullivan Drydock and Repair Corporation, et al,* 328 U. S. 275 (1946); *Restatement of Judgments,* Section 68.

"The rule that a judgment is conclusive of every fact necessary to uphold it admits of no exception * * * ."

2 Freeman on Judgments 1391.
See also Bigelow on Estoppel 6th Ed. pp 110, 111.

> "Regardless of any difference in the causes of action or subject matter, the conclusiveness of a former adjudication extends to every question and issue determined by the Court."

2 Freeman on Judgments 1450.

Ibid 1463

In a suit for deficiency of rent on account of the breach of an original lease and the releasing thereof, the prior judgment in an action for one month's rent under that lease, that the same was procured by fraud, "determined not merely for that case, but for all cases between the same parties, not only that there was nothing due for the rent claimed for the month of December, but that the lease itself was procured by fraud, and therefore void." *Wilson's Executor* v. *Deen,* 121 U. S. 525, 532. See also *Gates* v. *Preston,* 41 N. Y. 113; *Dunham* v. *Brower,* 77 N. Y. 76; *Reich* v. *Cochran,* 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805; *Foye* v. *Patch,* 132 Mass 105; *Swank* v. *St. Paul City RR Company,* (1895) 61 Minn 423, 63 N. W. 1088; *Krekeler* v. *Ritter* (1875) 62 N. Y. 372.

It is submitted that on the facts, and on the law as set forth in the foregoing cases, the finding of the lower court that, "A ruling that ownership relation did not exist as an actuality for one purpose, can hardly be thought to be determinative of the existence or non-existence of that ownership relation as a legal fiction for purposes of a statutory provision not involved in the earlier cases" is a misapplication of the rule as laid down by this court. The essential issue in this action is whether or not the petitioner is a transferee of assets of Northwestern Telegraph Company by reason of its receipt of the rental payments from Western Union. The

prior actions decided that Northwestern Telegraph Company had no right or title to or beneficial interest in the right to these rental payments. It is hard to see, if that is so, how the petitioner can be a transferee of Northwestern by reason of these payments.

The premise upon which the court proceeded in the earlier action is that Northwestern had parted with all interest in these payments in 1881 and placed the same completely beyond its control or the control of its creditors. It would be inconsistent with that judgment to hold now that each payment of rent under the lease constitutes a separate present transfer by Northwestern, as was held in *Commissioner* v. *Western Union Telegraph Co.*, 141 F. 2d 744, 777 (1944).

CONCLUSION

Certiorari Should Be Granted

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